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APPENDIX

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1967

No. 616

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY and
WARREN C. SCHWARTZ, Trustee in Bankruptcy of A & S
ELECTRIC CORP.,

Petitioners,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 14, 1967
CERTIORARI GRANTED DECEMBER 4, 1967

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Docket Entries

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

In the Matter

of

A & S ELECTRIC CORP.,

Bankrupt,

**JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY and
WARREN C. SCHWARTZ, Trustee in Bankruptcy of A & S
ELECTRIC CORP.,**

Appellants.


DATE

PROCEEDINGS

12-27-66 Filed record (original papers of District Court)
1-25-67 Filed brief and appendix, appellant
2- 3-67 Filed notice of appearances
2- 6-67 Filed supplemental record (original papers of
District Court)
2-15-67 Filed notice of appearances
2-17-67 Filed reply brief, (U.S.A.)
4-11-67 Argument heard (by: Lumbard, ChJ., Smith &
Feinberg, CJJ)

DATE

PROCEEDINGS

- 6-22-67 Judgment Affirmed, Lombard, ChJ.
- 6-22-67 Filed judgment
- 7-11-67 Issued Mandate (opinion & judgment)
- 7-18-67 Original and supplemental record returned to District Court
- 7-25-67 Filed receipt of return of original and supplemental record to District Court
- 7-26-67 Certified appendices and proceedings to Harold Stern
- 9-15-67 Filed notice of filing of petition for writ of certiorari
- 

Relevant Docket Entries

(pp. A-C)

UNITED STATES DISTRICT COURT**EASTERN DISTRICT OF NEW YORK**

In the Matter**of****A & S ELECTRIC CORP.,*****Bankrupt.***

Date**Proceedings**

5/25/66—Referee's Certificate on Review of order dated April 25, 1966 filed. Returnable June 8, 1966 at 10:00 A.M.

6/ 8/66—Before Rosling, J.—Hearing on petition for review, etc. Motion argued. Decision Reserved.

9/22/66—Decision by Rosling, J.

11/ 4/66—Order filed by Rosling, J.

11/17/66—Notice of Appeal filed.

11/17/66—Undertaking for Costs on Appeal filed. (Fid. & Dep. Co. of Md.)

**Judgment of the United States Court of Appeals
for the Second Circuit**

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court
of Appeals, in and for the Second Cir-
cuit, held at the United States Court-
house in the City of New York, on the
twenty-second day of June one thou-
sand nine hundred and sixty-seven.

Present:

HON. J. EDWARD LUMBARD,

Chief Judge,

HON. J. JOSEPH SMITH,

HON. WILFRED FEINBERG,

Circuit Judges.

In the Matter of

A & S ELECTRIC CORP.,

Bankrupt,

**JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY and
WARREN C. SCHWARTZ, Trustee in Bankruptcy of A & S
ELECTRIC CORP.,**

Appellants.

**Appeal from the United States District Court for the
Eastern District of New York.**

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 355—September Term, 1966.

(Argued April 11, 1967

Decided June 22, 1967.)

Docket No. 30992

In the Matter

of

A & S ELECTRIC CORP.,

Bankrupt,

JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY and
WARREN C. SCHWARTZ, Trustee in Bankruptcy of A & S
ELECTRIC CORP.,

Appellants.

Before:

LUMBARD, *Chief Judge,*
SMITH and FEINBERG, *Circuit Judges.*

Appeal from an order in the Chapter XI proceeding
of A & S Electric Corp., in the Eastern District of New
York, George Rosling, J., denying wage priority status to
a claim for unpaid contributions to an Annuity Plan.

Affirmed.

WARREN C. SCHWARTZ, Brooklyn, New York,
Trustee in Bankruptcy for A & S Electric Corp.

HAROLD STERN, New York, N. Y. (Norman Rothfeld, New York, N. Y., on the brief), for
Joint Industry Board of the Electrical Industry, appellant.

HOWARD M. KOFF, Department of Justice, Washington, D. C. (Richard C. Pugh, Acting Assistant Attorney General, Lee A. Jackson and Joseph Kovner, Department of Justice, Washington, D. C., and Joseph P. Hoey, United States Attorney for the Eastern District of New York, Brooklyn, New York, and Frank R. Natoli, Assistant United States Attorney, Brooklyn, New York, on the brief), for the *United States*.

LUMBARD, *Chief Judge:*

The Joint Industry Board of the Electrical Industry, which administers an Annuity Plan funded by employer contributions under a collective bargaining agreement between Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO, and four associations of electrical contractors in New York City, appeals from an order of Judge Rosling, affirming an order of Referee Warner in the Chapter XI proceeding of A & S Electric Corp. in the Eastern District of New York, denying priority status as "wages . . . due to workmen" under section 64a(2) of the Bankruptcy Act, 70 Stat 725 (1956), 11 U. S. C. § 104a(2), to the Joint Industry Board's claim for

unpaid contributions of \$5114 to the Annuity Plan. We agree with Judge Rosling that this claim must be denied a wage priority under the Supreme Court's decision in *United States v. Embassy Restaurant, Inc.*, 359 U. S. 29 (1959), and we affirm his order.

The Annuity Plan of the Electrical Industry, as amended to July 1, 1964, requires each employer of workers represented by Local Union No. 3 to contribute \$4.00 for each day's wages paid to each such worker. Each worker for whom such contributions are made becomes a Participant in the Plan, and he or his designated beneficiary is entitled to receive monthly payments of specified amounts, until the sums credited to his account are exhausted, upon his death, retirement from the industry at age sixty or over, permanent disability after working more than ten years for a contributing employer, or ceasing to be a Participant for any other reason. In addition, the beneficiary of a deceased Participant is entitled to death benefits out of the income of the Plan, if available, the amount varying with the length of his continuous participation in the Plan. The benefits payable under the Plan are expressly made non-assignable, and immune from attachment, garnishment, or other process. The trustees are authorized to invest and reinvest the funds of the Plan "in their sole discretion," and are made liable only for losses "due to their wilful misconduct or fraud."

Like the welfare fund contributions which the Supreme Court denied a wage priority in *United States v. Embassy Restaurant, Inc.*, *supra*, contributions to the Annuity Plan "are not 'due to workmen,' nor have they the customary attributes of wages." 359 U. S. at 33. The contributions in *Embassy Restaurant* were "flat sums of \$8 per month for each workman . . . without relation to his hours, wages

or productivity," 359 U. S. at 32; contributions to the Annuity Plan are likewise at a flat rate of \$4.00 for each day's wages. Moreover, as in *Embassy Restaurant*, the contributions are payable directly to the trustees of the Annuity Plan, who are vested with exclusive management of its funds; so far as the record shows, "a workman cannot even compel payment by a defaulting employer." 359 U. S. at 32; cf. *Local 140 Security Fund v. Hack*, 242 F. 2d 375 (2 Cir.), cert. denied, 355 U. S. 833 (1957).

The Court also observed in *Embassy Restaurant* that the congressional purpose in enacting the wage priority was "to provide the workman a 'protective cushion' against the economic displacement caused by his employer's bankruptcy," and that the welfare fund contributions, which were applied to life insurance, sick benefits, and hospital and surgical plans,

— "offer no support to the workman in periods of financial distress. Furthermore, if the claims of the trustees are to be treated on a par with wages, in a case where the employer's assets are insufficient to pay all in the second priority, the workman will have to share with the welfare plan, thus reducing his own recovery." 359 U. S. at 33-34.

The Joint Industry Board argues that the Annuity Plan does offer support to its Participants in periods of financial distress, because a worker who permanently ceases to be employed in the electrical industry ceases to be a Participant and is entitled to fixed monthly benefits. However, all indications are that relatively few workers whose employer becomes bankrupt will permanently leave the electrical industry. Moreover, the monthly benefits paid to a worker withdrawing from the electrical industry are fixed

at \$50.00 or (for workers leaving after January 1, 1965) \$60.00 a month. Thus allowing a wage priority to Annuity Plan contributions might well reduce the amount of unpaid wages a worker could realize from bankruptcy, and would not increase the amount of benefits immediately payable under the Plan unless his account with the Plan was empty. The Annuity Plan therefore does not afford a meaningful "protective cushion" against the economic dislocation caused by an employer's bankruptcy, and cannot be accorded a wage priority under *Embassy Restaurant*.¹

It has been forcefully argued that contributions to funds like the Annuity Plan should receive a wage priority in bankruptcy. See, e.g., *United States v. Embassy Restaurant, Inc.*, 359 U. S. 29, 35 (1959) (Black, J., dissenting); Note, Union Retirement and Welfare Plans; Employer Contributions as "Wages" Under Section 64a(2) of the Bankruptcy Act, 66 Yale L. J. 449, 460-61 (1957). But in light of the Supreme Court's decision in *Embassy Restaurant*, such an argument must be made to Congress, not to this court.

Affirmed.

(1505)

¹ The Joint Industry Board also relies on *Sulmeyer v. Southern California Pipe Trades Trust Fund*, 301 F. 2d 768 (9 Cir. 1962), which granted a wage priority to contributions to a Vacation and Holiday Benefit Fund. But that decision is clearly distinguishable in any event, as it rested on the facts that vacation pay had already been held entitled to a wage priority, see, e.g., *United States v. Munro-Van Helms Co., Inc.*, 243 F. 2d 10 (5 Cir. 1957), that taxes were withheld from employees on contributions to the Fund, and that the Fund established a separate savings account for each employee.

**Order of the United States District Court
Dated November 4, 1966**

(R. p. 1)

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

[SAME TITLE]

THE JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY having heretofore filed its petition for review of the order of Hon. Sherman D. Warner, Referee in Bankruptcy, dated April 25, 1966; and, said petition for review having come on for hearing on the 8th day of June, 1966, before Hon. George Rosling, Judge of the United States District Court for the Eastern District of New York, and Harold Stern, Esq., by Norman Rothfeld, Esq., attorneys for the Joint Industry Board of the Electrical Industry, the petitioner and objectant herein, and Schwartz and Duberstein, Esqs., attorneys for the trustee, having appeared in support of said petition, and Joseph P. Hoey, United States Attorney for the Eastern District of New York, by Steve C. Arniotes, Assistant United States Attorney, attorney for the United States of America, having appeared in opposition thereto, and the said Court having rendered a decision wherein the findings of fact and conclusions of law of the said Referee be affirmed,

Now, on motion of Joseph P. Hoey, United States Attorney for the Eastern District of New York, attorney for the United States of America, it is

ORDERED, that the said order is hereby confirmed.

Dated: Brooklyn, N. Y.,
November 4, 1966.

GEORGE ROSLING,
U.S.D.J.

**Opinion and Decision of United States District Court
Hon. George Rosling, Judge**

(R. pp. 2-11)

Order of Referee in Bankruptcy made April 25, 1966, certified for review on petition of the Joint Industry Board of Electrical Industry Local No. 3 (hereinafter the "Joint Board"), claiming to be a preferred creditor for wages owing to certain of the local's members is confirmed. The facts are not in dispute, having been stipulated to by the Joint Board and the trustee in bankruptcy. The issue is tendered by the opposition of the United States to recognition of the priority asserted by the petitioner for review.¹

The proof of claim was filed by the Joint Board in its own right, as a direct creditor of the bankrupt for unpaid contributions due to a Welfare Fund of which the Joint Board pursuant to a collective bargaining agreement between the local and the bankrupt as employer of the local's members was the trustee administrator. These employee-members were the beneficiaries of the funded contributions entitled themselves to receive, or to have transmitted to

¹ Wage claims are accorded second tier priority by Bankruptcy Act (the "Act") § 64a(2), 11 U.S.C. § 104a(2), and taxes legally due to the United States—the Government's claim here is for unpaid Internal Revenue taxes owing by the bankrupt and by the debtor in possession under Chapter XI prior to adjudication)—owing by the bankrupt a lesser fourth rank priority (ibid. (a)4). The pertinent language of the provision is as follows: § 64. "Debts Which Have Priority (a) The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be * * * (2) wages not to exceed \$600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, * * * ; (4) taxes legally due and owing by the bankrupt to the United States * * *"

their nominees, a variety of benefits the nature of which depended on which of divers alternative contingencies supervened.

The employees affected did not file direct claims herein as creditors,² nor assignments of such claims to the Joint Board with power of attorney to act for them, nor did the claim as filed declare it was vicarious in behalf of such individual workers the filing of which was duly authorized by them.³

² The Joint Board's procedure in this regard, it is fairly inferable, was deliberate and not the result of oversight. The first disclosure in the papers certified by the Referee of the names of the employees concerned and the amount of the "annuity" referable to each of them appear in a memorandum of law filed with the Referee by the attorney for the Joint Board in its behalf in support of the alleged second priority. The total of the annuities scheduled is \$5,114, the sum of the defaulted contributions.

³ See the following relevant provisions:

Act § 57d (11 U.S.C. § 93d), as to proof and allowance of unliquidated or contingent claim; id. subd. i, as to proof of a claim when a creditor whose claim against a bankrupt estate is secured in whole or in part by the individual undertaking of a person fails to prove and file his claim. The "person" furnishing the undertaking is subrogated to the rights of the non-filing creditor and may himself file, but with qualified right only to participate in dividends.

Id. subd. n, as to limitations for filing.

See also Act § 63a, proof of debts "founded upon . . . (8) contingent debts and contingent contractual liabilities;" and General Order 21 as to proofs of claim, passim, and specifically in subd. (1), as to the formal requirements of proof filed by an "agent"; subd. (3), regulations affecting claims assigned after the commencement of the proceedings, but before proof of claim has been filed; and subd. (5) with respect to the execution of a power of attorney to represent a creditor or assignment of claim after proof.

The relevancy of the foregoing rests upon the ambiguous status the Joint Board occupies as claimant, in that if the claim is for wages the Joint Board is not a direct creditor of the bankrupt for the liquidated total of unpaid contributions, but it would necessarily be an agent or assignee filing vicariously in behalf of the participant employees. Its claim would be for the total of the

This is not surprising when it is considered that the fund administered by the Joint Board with respect to the entire industry runs into enormous figures.⁴ Manifesting a prudent foresight, the draftsmen of the Annuity Plan provided in subd. (c) of its 9th section that

"No person claiming by or through any Participant by reason of having been named as beneficiary in a certificate, or otherwise, nor any contributing Employer, nor the Union, or any other person, partnership, corporation or association shall have any right, title or interest in or to the Annuity Fund or any part

unpaid contributions, to be deemed, in order to qualify for the wage preference, a part of the "wages" of the workers which they have transferred to the Joint Board or the value ("estimated" under § 57d) of the worker's wage interest in the contributions actuarially computed as of the date of the commencement of the Chapter XI bankruptcy proceeding.

This decision necessarily turns on a construction which subsumes within the category of "wages" only that which by statute, narrowly construed, is denominated such, to wit, money due and currently payable as compensation to workmen for their toil, or which by judicial gloss is held included, e.g. vacation credits. Wages, moreover, to qualify as such must be payable to the worker unconditionally and with promptitude after the services to be compensated by the payment are rendered. Resolution of collateral complexities generated by contrived arrangements intended for special objectives so as to give to a transaction the appearance of a wage payment, but wherein the substantial attributes of wages are lacking, is superfluous. What is here due and claimed is manifestly an obligation that is related to compensation for a wage earner's services. It does not, however, satisfy the statutory and judicially expanded definition of wages in the sense of employer to employee payments entitled to a second tier priority.

⁴ The attorney for the Joint Board declares in his affidavit in support of the petition for review that "[s]ince the Annuity Fund commenced operations in 1954 it collected credits for annuitants in the sum of \$110,990,345 and paid out to Participants and their beneficiaries the sum of \$26,657,642; the total net credits are \$84,332,703."

thereof. Under no circumstances shall any amount contributed by the Employers revert to them, or any of them."

The exclusory thrust of the provision is clear. It would have been unwise for the Joint Board to have risked diluting its clarity by urging before the Referee as a ground in support of its claim for the \$5,114 now at issue a direct participatory interest, legally maintainable, by the beneficiaries in the corpus of the Annuity Fund. It is this gingerly approach to the tripartite employer-Joint Board-employee relationship to the trust fund corpus and the concomitant employer-employee relationship to the wages payable that puts the monies contributed to the fund beyond the periphery of what the statute as judicially construed delimits as § 64a(2) wages.

United States v. Embassy Restaurant, Inc., 359 U. S. 29, 33-34, 79 S. Ct. 554, 557 (1959), in unambiguous language embodies the rule in the following words. The Bankruptcy Act, the opinion notes,

"fixes the relative priority of claims of classes of creditors. Here that class is 'wages * * * due to workmen.'

"The contributions here are not 'due to workmen,' nor have they the customary attributes of wages. Thus, they cannot be treated as being within the clear, unequivocal language of 'wages * * * due to workmen' unless it is clear that they satisfy the purpose for which Congress established the priority. That purpose was to provide the workman a 'protective cushion' against the economic displacement caused by his employer's bankruptcy. These payments owed as they are to the

trustee rather than to the workman, offer no support to the workman in periods of financial distress. Furthermore the claims of the trustees are to be treated on a par with wages, in a case where the employer's assets are insufficient to pay all in the second priority, the workman will have to share with the welfare plan, thus reducing his own recovery. * * * [T]he obligation to make contributions, when incurred, was to the trustees, not to the workmen. The debt was never owed the workmen. Furthermore, assignability of wage claims as in *Shropshire*,⁵ may benefit the bankrupt's employees, who are thus enabled to obtain money sooner than they might by waiting out the bankruptcy procedure."

In summation Embassy commented (359 U.S. at p. 35):

"Under the Bankruptcy Act, however, not all claims 'justly due' have priority. They must be within a class, such as 'wages * * * due to workmen.' [asterisks in original] The claims here are not. If this class is to be so enlarged, it must be done by the Congress."

⁵ *Shropshire, Woodliff & Co. v. Bush*, 204 U.S. 186, 27 S. Ct. 178 (1907).

⁶ See also: *Local 140 Security Fund v. Hack*, 242 F.2d 375 (2d Cir. 1957), cert. denied 355 U.S. 833; *Matter of Brassel*, 135 F. Supp. 827 (N.D.N.Y. 1955); *Los-Angeles Hotel-Restaurant Employer-Union Welfare Fund v. Bowie*, 283 F.2d 516 (9th Cir. 1960), cert. denied 365 U.S. 817. *Sulmeyer v. Southern California Pipe Trades Trust Fund*, 301 F.2d 768 (9th Cir. 1960) is distinguishable. It deals with vacation pay which although funded by trustees, was made available to the participating employee through a right of withdrawal during the year for the stated purpose of the accumulation. Additionally, the employer contributions to the earmarked fund were so closely assimilated to the wage concept that the employer perforce withheld with respect to the employee-beneficiary the employee's personal income tax, social security and un-

The benefits which the contributions here stipulated purchase for the worker are comprised in paragraph 7, and the disposition of the fund on termination, in paragraph 8, of the annuity plan. An admirable summary of these provisions, which need not here be repeated, is set out at pages 4 through 9 of the Referee's decision under review. The plan would appear to provide that in one sense or another the worker or his designees would get back in full the contributions for his account made at the rate "of Four (\$4.00) Dollars per day for each day worked by each employee who is a Participant of this Annuity Plan," (Annuity Plan § 6(a)), and which "shall be credited to the individual account of each Participant but shall be payable to him only as hereinafter [in § 7] provided." (§ 6(b)).

That the benefits have present, as well as maturity, value, and were in a real sense purchased by an aliquot fraction of the labor of the worker through the employer contributions remitted to the Joint Board cannot be gainsaid. To argue, however, that such circumstance equates what is paid by the employer and received by the Joint Board with "wages . . . due to workman," words of art under the Bankruptcy Act, is to follow the reasoning of the opinion of the dissenting minority in Embassy. Therein Justice Black had urged the Court, and failed to persuade it to his view, that the history, as he read it, of the priority

employment compensation deductions. [S]uch deductions" Sulmeyer notes, p. 771, "are indicia of wages." In the instant situation the welfare contributions are so far insulated from the status of wages that no such deductions were, or were required, to be made from the wages of the employees on account of the contributions, and income taxes were payable thereon by the worker only when he received payments under the plan. (See: IRC 72(a)(d)(1); 402(a)(1); 403(a)(1); 404(a)(2); 3121(a)(5)B; 3306(b)(5)B; 3401(a)(12)B.)

section should warn "against niggardly interpretations of the language," that it was hard for the distinguished jurist to see how the payments "could not be 'wages'." They "are certainly not gifts." (359 U.S. at p. 37) With considerable force he comments that

"It cannot be argued that a sum paid by an employer for a worker's services loses its status as wages merely because it is used to purchase insurance benefits. For the Bankruptcy Act has as yet authorized no investigation of how a worker spends his money to determine if he is entitled to priority for it. * * * It is also hard for me to imagine how the fact that the moneys are paid to parties other than the workmen is in any way connected with the question of whether payments are wages, whatever its relevance might be whether the sums are due to 'workmen'." (id. at p. 38)

Pointing to the Government's concession "that if a formal assignment had been made here, wage status might be granted" the Justice, after some discussion of such postulated situation not present in Embassy, states his view "finally" that

"it seems to me undesirable to make a distinction in this area between payments on assignment and payments in trust. At best it would let the carrying out of congressional policy depend on the skill with which unions prepare legal documents, and on the various state laws covering the validity of wage assignments. At worst it would give priorities to assignees of the workmen, usually creditors, while denying them to insurance funds for their benefit. * * * [T]he sums which Embassy contracted to pay to these

employees for their labor by making payments to welfare funds are wages due to workers." (id. at p. 40)

With the dissenters' gloss thus focusing upon the area of divergence from the majority's holding, it is clear that the force of the prevailing determination cannot be evaded or attenuated by seizing upon the adventitious and the accidental in the Court's opinion. One cannot, through a real or fancied meeting of the requirements implicit in some textual obiter, uttered, but not stressed as critical, contrive a bundle of distinctions whereby a contribution to a welfare fund may, Embassy notwithstanding, approximate in its attributes a payment of wages due to a workman so as to qualify it for the second priority. The contribution remains a contribution, and does not assume the status of wages.

If what is unquestionably a contribution to a welfare fund in which, qua fund the worker has no present interest, but from which he or his distributees may ultimately derive a benefit, is, nevertheless, to be denominated wages within the purview of § 64a(2), Embassy must either be overruled or now reread in a Pickwickian sense. For this Court to do so is to legislate a preference, a function beyond its competence and concern.

Settle order on notice.

GEORGE ROSLING,
U. S. D. J.

Order of Referee

(R. pp. 12-13)

UNITED STATES DISTRICT COURT**EASTERN DISTRICT OF NEW YORK**

[SAME TITLE]

At Jamaica, New York, in said District,
on the 25 day of April, 1966.

UPON the annexed stipulation by and between Schwartz & Duberstein, Esqs., attorneys for the Trustee, and Harold Stern, Esq., attorney for the Joint Industry Board of the Electrical Industry, Local #3, dated June 14, 1965, and Claim No. 4 of the Joint Industry Board of the Electrical Industry, Local #3, in the sum of \$10,537.34 on file herein, and all proceedings heretofore had herein, it is

On motion of Schwartz, Duberstein, Esqs., attorneys for the Trustee,

ORDERED, that that portion of the claim representing funds payable by the bankrupt into Union Annuity Funds in the sum of \$5,114.00 for which priority was asserted, is to be allowed as a general claim without priority, and it is further

ORDERED, that the portion of the claim representing deductions from payroll in the sum of \$510.00 for which

priority was asserted, is to be allowed as a priority claim, and it is further

ORDERED, that the portion of the claim representing vacation expense account in the sum of \$1,624.53 for which priority was asserted, is to be allowed as a general unsecured claim, and it is further

ORDERED, that the remainder of the claim representing Pension, Hospitalization and benefits in the sum of \$2,030.66, cost of administration funds in the sum of \$304.60, 1% of payroll from Local Employees Benefit Board in the sum of \$572.72, and disability contributions benefits plan in the sum of \$380.83, are to be allowed as general unsecured claims, and it is further

ORDERED, that the funds hereinabove set forth entitled to priority amount to \$510.00, and said claim No. 4 is to be allowed as a priority claim for said sum of \$510.00, and it is further

ORDERED, that the balance of the aforesaid claim amounting to \$10,027.34 is to be allowed as a general claim.

SHERMAN D. WARNER,
Referee in Bankruptcy.

Opinion and Decision of Referee

(R. pp. 16,30)

The Joint Industry Board of the Electrical Industry, an unincorporated association, has filed its proof of claim, No. 4, in this proceeding for an indebtedness in a total amount of \$10,537.34. That total sum includes \$5,114.00 which the debtor has failed to pay claimant pursuant to Annuity Plan of the Electrical Industry Agreement of December 11, 1957 and represents the total of \$4.00 per day contributions for each day worked by each employee who is a participant of the Annuity Plan, which plan is alleged to be a part of the debtor's collective bargaining agreement.

The balance of the claim which the debtor allegedly has failed to pay to the claimant consists of several total amounts in as many categories which are alleged to have been required according to said collective bargaining agreement.

This decision has to do with only that part of said claim which is alleged to constitute a priority wage claim \$5,114.00.

On January 9, 1963 the bankrupt filed its petition under Chapter XI, Section 322, for an arrangement and was adjudicated on November 6, 1963. The trustee having qualified; his attorney and the attorney for the Joint Industry Board of the Electrical Industry, Local #3, stipulated on June 14, 1965 how each of the several amounts of the claim would be allowed and agreed to allow that portion of the claim representing funds payable by the bankrupt into Union Annuity Funds in the sum of \$5,114.00 as a priority wage claim.

On or about August 5, 1965, the stipulation, together with a proposed order to approve it, was submitted for signature and entry. This Referee believing the stipulation insofar as it allowed the \$5,114.00 portion of the claim as a priority contravened the provisions of Section 64a(2) of the Bankruptcy Act, requested and received from the respective attorneys memoranda of law on the right to priority of that portion of the claim. At a later date a memorandum was received from the United States Attorney for this district in opposition to the priority status for said \$5,114.00.

The balance of the stipulation which determines the priority or non-priority status of the remaining items is not questioned.

Section 64a(2) provides in part:

"The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment shall be . . . (2) wages and commissions, not to exceed \$600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; . . ."

FACTS

According to the uncontroverted allegations in the proof of claims, the consideration for the \$5,114.00 debt is alleged as follows:

"The Debtor operated under a collective bargaining agreement with Local Union No. 3, International

Brotherhood of Electrical Workers, AFL-CIO. By the terms of this agreement the Debtor was required to contribute to, and the claimant was empowered and required to administer, various Trust Funds established for the welfare of the employees of the Debtor. The Debtor has failed to make certain required payments for the above described funds during the three months prior to the filing of its petition. The Annuity Plan of the Electrical Industry incorporated as part of the Debtor's collective bargaining agreement in Article II, Section 1 (e) thereof, provides as follows:

'(a) Beginning with the first payroll week after January 1, 1954, and every week thereafter up to December 31, 1957, and for the duration of any renewal or extension of the collective bargaining agreement between the Employer and the Union, each electrical contractor shall pay into the Annuity Fund the sum of Four (\$4.00) Dollars per day for each day worked by each employee who is a Participant of this Annuity Plan.

'(b) The aforesaid Employer contributions under paragraph (a) hereof shall be credited to the individual account of each Participant but shall be payable to him only as hereinafter provided.

'(c) Such contributions shall be forwarded weekly to the Trustees within one (1) week after each payroll period.'

"The Debtor has failed to pay over to claimant this \$4.00 per day contribution in the amount of \$5,114.00. This sum constitutes priority wage claim because these

monies are held by claimant for the individual accounts of the employees of the Debtor."

The attorney for claimant has not submitted the collective bargaining agreement for consideration by the Court, but he has submitted the Annuity Plan of the Electrical Industry Agreement (hereinafter referred to as the Annuity Plan) entered into and adopted at New York City the 11th day of December 1957, by and between the New York Electrical Contractors' Association, Inc., The Master Electrical Contractors' Association, Inc., the Greater City Electrical Contractors Association, Inc. and the Association of Electrical Contractors, Inc., each an employers trade association, having its principal place of business located in the City of New York, representing the employers in the electrical contracting industry, hereinafter jointly referred to as the "Employer" or the "Employer Association" and Local Union No. 3 of the International Brotherhood of Electrical Workers, AFL-CIO, hereinafter referred to as the "Union".

The above quoted provisions from Article II, Sec. 1(3) of the debtor's collective bargaining agreement repeats verbatim paragraphs (a), (b) and (c) of Sec. 6 of the Annuity Plan:

6. "EMPLOYER CONTRIBUTIONS: All contributions shall be determined as follows:

(a) Beginning with the first payroll week after January 1, 1954, and every week thereafter up to December 31, 1957, and for the duration of any renewal or extension of the collective bargaining agreement between the Employer and the Union, each electrical contractor shall pay into the Annuity Fund the

sum of Four (\$4.00) Dollars per day for each day worked by each employee who is a Participant of this Annuity Plan.

(b) The aforesaid Employer contributions under paragraph (a) hereof shall be credited to the individual account of each Participant but shall be payable to him only as hereinafter provided.

(c) Such contributions shall be forwarded weekly to the Trustees within one (1) week after each payroll period."

(See page 9, Sec. 6 of the Annuity Plan booklet, 1959 edition in silver cover, referred to as Booklet.)

Sections 4 and 5 of the Annuity Plan, page 8 of Booklet define:

4. *Participants*: Each employee of each contributing Employer who is employed within the bargaining unit included in the collective bargaining agreement between the Union and the Employer shall be eligible to participate in this Annuity Plan and shall be a Participant."

5. *Contributing Employers*: The parties intend that this Annuity Plan and the obligations to make contributions hereunder shall apply uniformly to every electrical contractor who is now a member of the Employer Association or who may hereafter join it and to every electrical contractor (whether or not a member of the Employer Association) who may now or hereafter employ persons within the bargaining unit. It is and it shall continue to be a condition precedent to the liability of any electrical contractor to make

contributions hereunder, that the Union will have and maintain at all times agreements requiring identical contributions from all Employers of persons within the bargaining unit and providing similar benefits for such persons."

The benefits under the Annuity Plan are set forth in Section 7 which is divided into twelve (12) paragraphs defining and limiting the conditions under which the participant employee shall be entitled to receive benefits under the plan. Paragraph (a)(1) is inapplicable because it provides for the payment of the sum of \$1,000.00 as a death benefit to employee's designated beneficiary should participant die between January 1, 1954 and December 31, 1954. The payment may be made either in a lump sum or in monthly installments of \$100.00 each, as the Trustees in their sole discretion may determine.

Paragraph (a)(2) seems inapplicable because it provides that any Participant covered by this Annuity Plan prior to January 1, 1956 who should die on and after January 1, 1955, and on or before December 31, 1957, both dates inclusive, then his designated beneficiary shall be paid the sum of \$2,000.00 as a death benefit, either in a lump sum or in monthly installments of \$100.00 each, as the Trustees in their sole discretion may determine.

Paragraph (a)(3) provides that a Participant who did not become such until after January 1, 1956, and died after he had one year's continuous participation in the Annuity Plan, then his designated beneficiary shall be paid the sum of \$1,000.00 as a death benefit, and should such Participant die after two years' continuous participation his designated beneficiary shall be paid the sum of \$2,000.00 as a death benefit, either in a lump sum or in monthly install-

ments of \$100.00 each, as the Trustees in their sole discretion may determine.

Paragraph (b) requires payment to the beneficiary of all monies credited to the account of the Participant, in addition to the above benefits. Obviously the benefits payable under these four paragraphs have no relation to the amount of contributions made under the Annuity Plan and such contributions cannot be equated to wages.

Paragraph (b) sets forth the first provision for the payment to the beneficiary of the contributions credited to the account of the Participant, but they are not paid as wages or as an assignment of wages by the employee.

Subdivision (c), Section 7, is divided into three paragraphs including a schedule of payments to a participant who should retire from the industry at the age of sixty (60) or over.

Paragraph (c)(1) provides that if participant retires prior to April 1, 1959 he shall receive \$50.00 per month until the monies credited to his account are exhausted. If he retires after April 1, 1959, he shall be entitled to receive \$75.00 per month until said monies credited to his account are exhausted.

Paragraph (c)(2) provides that a retired Participant who dies while receiving a pension and before he has exhausted his account, then the balance accumulated shall be paid to his designated beneficiary in monthly installments of \$100.00 each, or in a lump sum as the Trustees may decide. In addition, upon such death the Annuity Plan shall pay to the designated beneficiary death benefits in accordance with the table as set forth in said section:

\$200. for one year's continuous participation

\$300. for up to and including two years continuous participation

\$400. for up to and including three years continuous participation
 \$500. for up to and including four years continuous participation
 \$600. for up to and including five years continuous participation
 \$700. for up to and including six years continuous participation
 \$800. for up to and including seven years continuous participation
 \$900. for up to and including eight years continuous participation,
 and \$1,000. for more than eight years continuous participation in monthly installments of \$100. each, or in a lump sum as the Trustees may decide. These death benefit payments set forth above shall be retroactive without regard to the date of death of the participant.

Thus under subdivision (c) of Sec. 7, where an annuitant dies after he has retired, but before exhausting the contributions credited to his account, his designated beneficiary receives in addition to the remaining accumulated balance of contributions, the death benefits set forth in the schedule. So that in this event, the payments are not equated to wages.

Paragraph (3) of subdivision (c) covers the event when a retired participant returns to the employ of the contributing employer and it deems him to be a new participant as of the date of his return to employment, and it limits his maximum death benefits as provided in Par. 7(a)(3) and provides that should he die before he becomes entitled to the maximum death benefit, his beneficiary shall receive a

sum not to exceed the amount of death benefit as provided in the above mentioned paragraph, nor less than the amount set forth in paragraph 7(c)(2) of the Annuity Plan.

This is also a provision that is not related to or equated to wages.

Subdivision (d) of Sec. 7, is divided into two paragraphs. (1) limits payments to Participants to \$50.00 per month until the monies credited to his account have been exhausted in the event that Participant becomes permanently disabled, ceases to be a Participant, or enters the Armed Forces of the United States, when he shall cease to be covered under this Plan. (2) provides for the event that if such former participant should die before he has exhausted his account then the balance accumulated shall be paid to his beneficiary in monthly installments of \$100.00 each, or in a lump sum, as the Trustees may decide.

Section 8 covers the termination of the Plan and it may be stated generally, that it may be terminated when there is no longer in force an agreement between the Employer and the Union requiring Employer contributions to said Annuity Fund, in which event the Trustee shall apply the fund to pay or provide for the payment of any and all obligations of the said Trust and distribute and apply any remaining surplus in such manner as will best effectuate the purpose of said Trust; provided that no part of the corpus or income of said Trust shall be used for or diverted to purposes other than the exclusive benefit of the Participants, or the administrative expenses of the Annuity Fund or for other payments in accordance with the provisions of the Annuity Plan.

Here again the distribution to be made by the Trustees on termination has no semblance to wages.

Under Section 9—*General Provisions*, paragraph (c) provides as follows:

“No person claiming by or through any Participant by reason of having been named as beneficiary in a certificate, or otherwise, nor any contributing Employer, nor the Union, or any other person, partnership, corporation or association shall have any right, title or interest in or to the Annuity Fund or any part thereof. Under no circumstances shall any amount contributed by the Employers revert to them, or any of them.”

It is obvious from the above provision that the Participant has no control over the contributions to the Annuity Fund and may not assign them, or pledge them, or borrow against them, or use them as his own.

Section 2 of the Plan provides for the administration of contributions by certain enumerated Trustees.

(2)(e) governs the Trustees power to reinvest all funds of the Annuity Plan in securities and they may purchase, lease, sell, exchange, convey or dispose of any property real or personal. They may borrow money to carry out the purposes of the fund and pledge any securities, and mortgage any property, real or personal, or any interest therein, for the payment of any such loans; lend monies upon such terms and conditions as they deem advisable; and do all acts, whether or not expressly authorized therein, which the Trustees may deem necessary or proper to effectuate the foregoing and for the protection of the property held under that section.

(2)(d) provides that the Trustees may employ counsel and agents and such clerical, accounting and actuarial ser-

vices as they may require. They may purchase supplies and equipment, pay salaries of employees, counsel fees, and the cost of supplies, equipment and payment of all other expenses which the Trustees find to be reasonable and necessary in connection with the administration of the Fund or which may have been incurred in connection with the establishment thereof, shall be paid upon their order from the Fund.

Thus we have the express authorization to invade the Fund and the contributions for the benefit of the participants which would diminish the contributions made for the benefit of the participants and the participant has no control over the acts of the Trustees made in good faith with reasonable care.

Obviously the "wages" of an employee participant earned within three months of the filing of the employer's petition were never intended under the Annuity Plan to be or become part of the Fund.

Whether the total sum of \$5,114.00 claimed for the Annuity Plan was earned within three months before the filing of the petition would be immaterial, if in fact none of it is entitled to priority.

United States v. Embassy Restaurant, Inc., (1959), 359 U.S. 29, 79 S. Ct. 554, is controlling, the facts in the instant case being almost identical with the facts in that case. Concerning the Embassy decision it was said in *Sulmeyer v. Southern California Pipe Trades Trust Fund*, (CA 9 1962), 301 F. 2d, 768.

"(There) the Supreme Court held that contributions to be paid to a union welfare fund did not constitute 'wages' . . . due to workmen,' within the meaning of Sec. 64(a)(2) . . ., but the ratio decidendi of the

decision was the nature of the contributions involved, the Court stating, inter alia: "They are flat sums of \$8. per month for each workman. The amount is without relation to his hours, wages or productivity. It is due the trustees, not the workman, and the latter has no legal interest in it whatsoever. A workman cannot even compel payment by a defaulting employer. Moreover it does not appear that the parties to the collective agreement considered these welfare payments as wages. The contract here refers to them as 'contributions'. Finally Embassy's obligation is to contribute sums to the trustees, not to its workmen; it is enforceable only by the trustees who enjoy not only the sole title, but the exclusive management of the funds." (359 U.S. at 32-33)

The *Sulmeyer* case is not in point. There the Court said:

"... no flat sum is involved, but rather a percentage of the employees' wages, and the amount varies directly according to wage rate and hours worked; and although the trustees do have certain supervisory powers over the trust funds, each employee has vested rights therein, with only the time of actual enjoyment being postponed until immediately before the Christmas holiday season and before the employee's vacation period; and, moreover, payments are made to the trust funds only after withholding therefrom the employees' personal income tax, social security and unemployment compensation deductions;"

"The only purpose of respondent's fund was to provide the employees with the vacation and holiday pay which they had earned, and which they, or their heirs,

were certain to get. (Exhibit B, Addendum, Sec. 2(c) and Secs. 3(g) and 3(h).) It was not to provide benefits, such as are to be found in the Embassy case, which might or might not be obtained by the wage earner."

In the Embassy case the contributions, as above noted were flat sums of \$8.00 per month for each workman. In *Los Angeles Hotel-Restaurant Employer-Union Welfare Fund v. Bowie*, (C.A. 9 1960), 283 F.2d 516, Cert. Den., 365 U.S. 817, unpaid sums due to Union Welfare Funds from the employer under a collective bargaining agreement were denied priority on the authority of the Embassy Restaurant case, *supra*.

The Sulmeyer decision comments on the Bowie case in footnote (3) saying:

"Petitioner, who either was a party in the Bowie case or who argues from the briefs there submitted, urges that the district court's distinction was rejected in Bowie because there the contributions were based on eight cents per hour worked by each employee, and consequently, bore a direct relationship to the employee's wages, hours and productivity. That the contributions in Bowie were controlled by the Embassy decision is apparent; eight cents an hour is a flat rate contribution remarkably similar to the \$8 per month per full-time employee contributed in the Embassy case. Here, however, the contributions were seven and one-half per cent of the gross pay of each employee, which is not a flat rate in the same sense used in Embassy, and presumably, in Bowie. . . ."

The Embassy case cited with approval the rationale of *Local 140 Security Fund v. Hack*, (C.A. 2nd 1957), 242 F.2d,

375, and the Hack case in turn cited with approval *In re Brassel*, (N.D.N.Y. 1955) 135 F. Supp. 827, and Embassy also cited with approval *In re Victory Apparel Mfg. Corp.*, (D.C.N.J. 1957), 154 F. Supp. 819. Embassy overruled the holding *In re Embassy Restaurant, Inc.*, (CCA 3rd 1958), 254 F.2d 475, which cited with approval *In re Otto* (S.D. Cal. 1956), 146 F. Supp. 786.

In this pending matter the employer's contributions were to be \$4. per day for each day worked by each employee who is a participant of the Annuity Plan. In the Bowie case the contribution was at the rate of eight cents per hour worked by each employee and in the Embassy case the contributions were flat sums of \$8. per month for each workman. The analogy seems obvious and I hold as they did, that the contributions in the instant case are flat rate contributions without relation to hours, wages or productivity. The character of the debts were fixed as they were incurred.

In *Embassy* the Court said:

"The contributions here are not 'due to workmen' nor have they the customary attributes of wages. Thus, they cannot be treated as being within the clear, unequivocal language of 'wages . . . due to workmen' unless it is clear that they satisfy the purpose for which Congress established the priority. That purpose was to provide the workman 'a protective cushion' against the economic displacement caused by his employer's bankruptcy." (*In re Victory Apparel Manufacturing Corp.*, *supra*)

"These payments, owed as they are to the trustee rather than to the workman, offer no support to the workman in periods of financial distress. Furthermore, if the claims of the trustees are to be treated on a

par with wages, in a case where the employer's assets are insufficient to pay all in the second priority, the workman will have to share with the welfare plan, thus reducing his own recovery."

In the *Hack* case *supra*, our Court of Appeals speaking through Judge Leibell said:

"The claim in its origin must be one for wages due to a workman, to be entitled to priority under Section 64(a)(2). If it is, the right of priority carries over to the workman's assignee. If the claim was never a part of his wages and was never a sum due to him, it would not be entitled to priority; and no theory of an indirect conditional benefit to him can give it priority. 'The priority is attached to the debt, and not to the person of the creditor; to the claim and not to the claimant.'" (*Shropshire, Woodliff & Co. v. Bush*, 204 U.S. 186;)

Judge Hincks concurring said:

"I add these few words only to make it plain that in my opinion the indicated result is required (affirming the order of the District Judge) not only because the debts for which the statutory priority is claimed are not 'wages' but also because they are not 'due to workmen, servants, clerks, etc.' To me it seems self-evident that the appellant Fund is not a workman. Nor have any of the 'workmen' assigned their claims to the appellant. It appears to me wholly inadmissible to say that the appellant is an 'equitable assignee' of the 'workmen' when, as the appellant truly says in its brief, no employee 'has any right, title or interest

in the trust fund, except the right to insurance coverage and welfare benefits'; and 'No employee has an option to receive any part of the employer's contribution in lieu of insurance benefits.' "

In reviewing these various decisions additional points are made which seem pertinent as a test for priority. *In re Brassel, supra*, the contributions were held not entitled to the status of wages because the basis for benefit was union membership not the employment relationship.

In the *Hack* case, *supra*, both the City of New York and the U.S. Government who were tax claimants joined in opposing priority for the funds claimed.

Also, Section 17 of the Bankruptcy Act exempts from the effects of a discharge such debts as are for wages which have been earned within three months before the date of the commencement of the proceedings in bankruptcy due to workmen, servants, clerks, etc. Embassy suggested that if the instant claim were allowed priority as wages it would be non-dischargeable to the extent set forth in Section 17. And the Annuity Plan might seek to collect these wages from each employee participant, thus an obligation of the workman might be created which was never intended by the parties to the Collective Bargaining Agreement.

The Attorney for the Trustee has been advised by Jacob Turoff, Certified Public Accountant of the firm of Schwartz & Turoff, the accountants for the debtor in possession and for the Trustee, that the contributions made to the plan were not deducted by the bankrupt in its corporate income tax return as salaries and wages, but were deducted as a contribution to an Annuity Plan, as provided for in the return, (see item 25(a) of Form 1130-U.S. Corporation Income Tax Return).

The United States Attorney appearing and opposing that part of the stipulation at issue showed that it had filed a claim for Internal Revenue taxes in the arrangement proceeding in the amount of \$15,587.55, and that the debtor in possession during the arrangement failed to pay certain taxes, and Supplemental Statements of Internal Revenue Taxes due were filed in the amounts of \$4,343.58 and \$31.27. Therefore it is a party interested in the status of the claim and its claim for taxes would be directly affected by any determination as to priority. Although the stipulation between the Trustee and the Joint Industry Board of Electrical Workers, Local No. 3, was submitted without notice to the United States, the United States is a proper party in interest and has submitted its memorandum relying on the Embassy decision and distinguishing the Sulmeyer case. The United States Attorney concludes that priority should not be accorded to the \$5,114.00 portion of the claim. And in further support of his position he quotes from the matter of *Sleep Products, Inc.*, 141 F. Supp. 463 (D.C.N.Y., 1956), *Aff'd*, 242 F.2d 375, Cert. Den 355 U.S. 833 rehearing denied 358 U.S. 860, which holds that such contributions are not chargeable to wages or current income to the employee. See also Internal Revenue Code of 1954, Sections 403(a)(1) and 404(a)(2).

For all of the foregoing reasons I find and decide that the item of \$5,114.00 of Claim No. 4 of the Joint Industry Board of Electrical Workers, Local No. 3 is a claim for contributions to the Union Annuity Funds. That the sum of \$5,114.00 is not comprised of wages or commissions not to exceed \$600.00 to each employee of the bankrupt or debtor which had been earned within three months before the date of the commencement of the within proceedings (Sec. 64(a)(2)). And that no part of said amount of claim is entitled to priority under said section.

That paragraph (a) of the stipulation entered into between the Joint Industry Board of the Electrical Industry, Local No. 3 and the Trustee, dated June 14, 1965, under which said sum of \$5,114.00 would be allowed as a priority claim may not be approved.

That the sum of \$5,114.00 is a general claim and the order heretofore submitted for the purpose of approving said stipulation has been signed and entered simultaneously herewith, as amended, to allow said item of \$5,114.00 as a general claim only.

Dated at Jamaica, New York,
April 25, 1966.

/s/ SHERMAN D. WARNER,
Referee in Bankruptcy.

Stipulation Allowing Claim as a Priority Wage Claim
(R. pp. 14-15)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

[SAME TITLE]

IT IS HEREBY STIPULATED, CONSENTED TO AND AGREED that Claim #4 filed by the Joint Industry Board of the Electrical Industry, Local #3, filed in the sum of \$10,537.34 in the within proceedings, be and the same hereby is allowed as follows:

(a) That portion of the claim representing funds payable by the bankrupt into Union Annuity Funds in the sum of \$5,114.00 for which priority was asserted, is to be allowed as a priority claim.

(b) That portion of the claim representing deductions from payroll in the sum of \$510.00, for which priority was asserted, is to be allowed as a priority claim.

(c) That portion of the claim representing vacation expense account in the sum of \$1,624.53, for which priority was asserted, is to be allowed as a general unsecured claim.

(d) That the remainder of the claim representing Pension, Hospitalization and benefits in the sum of \$2,030.66, cost of administration funds in the sum of \$304.60, 1% of payroll for Local Employees Benefit Board in the sum of \$572.72, and disability contributions benefits plan in

the sum of \$380.83, are to be allowed as general unsecured claims.

(e) That the funds hereinabove set forth entitled to priority amount to \$5,624.00 and said claim #4 is to be allowed as a priority claim for said sum of \$5,624.00.

(f) That the balance of the aforesaid claim amounting to \$4,913.34, is to be allowed as a general unsecured claim. and it is

FURTHER STIPULATED, CONSENTED TO AND AGREED that an order on the within stipulation may be submitted to Hon. Sherman D. Warner, Referee in Bankruptcy in these proceedings without further notice.

Dated: Brooklyn, New York,
June 14, 1965.

/s/ SCHWARTZ & DUBERSTEIN,
Attorneys for trustee.

HAROLD STERN,
Attorney for Joint Industry Board
of the Electrical Industry, Local #3

Affidavit of Harold Stern

(R. pp. 31-41)

UNITED STATES DISTRICT COURT**EASTERN DISTRICT OF NEW YORK**

[SAME TITLE]

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

HAROLD STERN, being duly sworn, deposes and says:

1. I am the attorney for the Joint Industry Board of the Electrical Industry. I make this affidavit in support of the Petition to Review and reverse the Order herein of Honorable Sherman D. Warner, Referee in Bankruptcy.

2. On June 14, 1965, I, as attorney for the Joint Industry Board of the Electrical Industry, entered into a stipulation with Schwartz & Duberstein, Esquires, attorneys for the Trustee in Bankruptcy, which provided among other things "(a) That portion of the claim representing funds payable by the Bankrupt into Union Annuity Fund in the sum of \$5,114.00. for which priority was asserted, is to be allowed as a priority claim."

3. As consideration for said stipulation I withdraw the Joint Industry Board's claim to wage priority for other sums payable on behalf of the bankrupt's employees. Had I not anticipated that said stipulation would be approved by the Referee, I would not have entered into it.

4. Referee Warner held no hearing, and no facts are in dispute with respect to this matter.

5. Each employer in the electrical construction industry in the New York area contributes on behalf of each employee the sum of \$4.00. for each day worked, which sum has been credited to his individual account (Section 6 of the Annuity Plan, set forth in the Referee's Decision at page 4). Every month each employee receives a statement setting forth every payment made into his account and his balance in his account.

6. Referee Warner relied in his Decision, dated April 25, 1966, upon the language of the Annuity Plan of the Electrical Industry Agreement, including language which is irrelevant to this matter. He also relied on inferences with respect to possible occurrences which might affect the status and integrity of employer payments to the Annuity Fund, which have in fact never occurred and never can occur.

7. Referee Warner stated five conclusions which allegedly supported his decision that payments to the Annuity Fund are not entitled to wage priority. The Referee erred with respect to each of his conclusions.

8. The Referee's first conclusion (Decision, page 8) is that "the Participant has no control over the contributions to the Annuity Fund * * *". The Referee based his conclusion upon Section 9, paragraph (c) of the Annuity Plan, which provides that no person "shall have any right, title or interest in or to the Annuity Fund or any part thereof". This provision, however, protects the Participant from creditors and other claimants but does not pre-

vent any Participant from obtaining the monies accumulated in his personal account when he ceases to be employed in the electrical industry in New York; he can of course cease such employment whenever he wishes.

9. The Referee's second conclusion (Decision, page 9) is that because the Trustees have a right to invest the funds and pay salaries, there is "express authorization to invade the Fund and the contributions for the benefit of the Participants which would diminish the contributions made for the benefit of the Participants * * *". This conclusion is erroneous. Since the Annuity Fund commenced operations in 1954 it collected credits for annuitants in the sum of \$110,990,345. and paid out to Participants and their beneficiaries the sum of \$26,657,642; the total net credits are \$84,332,703. The Annuity Fund maintains a separate account for the income earned from the employer contributions. The income fund balance is now \$10,056,388; the income for the past six months was \$543,413. Of the income fund balance \$3,081,797. is reserved for the payment of death benefits.

With respect to administration expenses. The Annuity Plan administers the Annuity Fund which includes the individual accounts of approximately ten thousand (10,000) men. Naturally, such work entails the employment of clerks, stenographers and other clerical help. The administrative cost of operating the Annuity Plan is less than one (1%) percent compared to administration expenses of operating similar funds which run from five (5%) percent to ten (10%) percent.

Never has a single Participant been deprived of a penny of his equity on account of administration expenses or for any other reason. This statement is easily verifiable

through records of investigation by, and reports to, the Internal Revenue Service, the New York State Insurance Department, and Certified Public Accountants.

10. The Referee in his Decision (pages 5, 6 and 7) sets forth the clauses relating to various death benefits paid to beneficiaries of Participants. Millions of dollars in death benefits are paid out from the income earned from the Participants' funds. They are not payable out of principal. In view of the abundant income available for the payment of death benefits, the Referee clearly has no reason to suppose that the principal of the Participants' accounts might be invaded for any cause whatever.

11. That Referee's third conclusion (Decision, pages 9 et seq.) is that *United States v. Embassy Restaurant, Inc.*, 1959, 359 U.S. 29, 79 S.Ct. 554, is controlling. In my brief to the Referee, I not only set forth four substantial distinctions between the facts in *Embassy* and the instant case, but I showed that the language in *Embassy* requires a ruling in the instant case which is contrary to the Referee's Decision. I attach hereto copy of my brief to the Referee.

12. The Referee's fourth conclusion (Decision, page 13) is that if the instant claim were allowed wage priority, since it would then be non-dischargeable, "the Annuity Plan might seek to collect these wages from each employee Participant, thus an obligation of the workman might be created, which was never intended by the parties to the Collective Bargaining Agreement." This argument is likewise without merit. In the first place the moment the instant claim is allowed priority as wages the Trustee in

Bankruptcy will be free to pay this claim and he has funds available. In the second place, I as attorney for more than thirty years for the Union and also for the Joint Industry Board of the Electrical Industry, which consists of representatives of all the parties to the Collective Bargaining Agreement, categorically state that no party to the Collective Bargaining Agreement has ever contemplated seeking to collect wages from employee Participants, and I would advise all parties that the Joint Industry Board has no right under any circumstances to collect these wages from the Participants.

13. Finally, the Referee cites and appears to adopt (Decision, page 14) the argument of the United States Attorney, that *Sleep Products, Inc.*, 141 F. Supp. 463 (D.C. N.Y., 1956) aff'd 242 F. 2d 375, cert. den. 355 U. S. 833, which holds that where the employer does not pay withholding taxes, his contributions are not chargeable to wages and are not current income to the employees, is applicable herein. We urge that *Sleep Products* has been superseded by *Embassy Restaurant, Inc.*, which does not hold that failure to pay withholding taxes deprives contributions of their status as wages under the Bankruptcy Act.

14. The Referee by upholding *Sleep Products* and applying said doctrine to the Annuity Fund thereby produced the result that payments are not "wages due to workmen" unless part thereof is immediately paid to an entity other than the workman, namely, the United States Government. Under our Annuity Plan a larger share of this money goes to the workman because taxes are not withheld, and he usually asks for his money when he ceases to be employed in the electrical industry in New York or he retires, so

that his income tax rate is lower at that time. Of course, if he chooses to collect his equity while he is earning substantial income by working for someone other than a "contributing employer" he may do so and he would then not reduce his income tax rate, but the choice is his. Surely Section 64(a)(2) of the Bankruptcy Act was not enacted to maximize collection of income taxes on behalf of the Bureau of Internal Revenue.

HAROLD STERN

(Sworn to May 4, 1966.)

Memorandum, Annexed to Foregoing Affidavit

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

[SAME TITLE]

**MEMORANDUM IN SUPPORT OF STIPULATION
ALLOWING CLAIM ON BEHALF OF ANNUITANTS
AS PRIORITY WAGE CLAIM.**

STATEMENT

This memorandum is submitted on behalf of the Joint Industry Board of the Electrical Industry in support of the status as a priority wage claim of \$5,114.00. payable to the Participants of the Annuity Plan of the Electrical Industry, hereinafter named.

No facts are at issue with reference to the foregoing claims.

POINT I

**THE CLAIM OF THE JOINT INDUSTRY BOARD IS ENTITLED TO
WAGE PRIORITY IN THE AMOUNT OF \$5,114.00.**

As set forth in the Proof of Claim, made by Denis J. Crimmins, Executive Secretary of the Joint Industry Board of the Electrical Industry, timely filed on February 15, 1963 with the Clerk of the United States District Court for the Eastern District of New York, the Debtor became indebted to the Annuity Plan in the amount of \$5,114.00,

all of which accrued between November 1, 1962 and January 10, 1963—within three (3) months prior to the filing of the petition herein. Pursuant to collective bargaining agreement between the Debtor and Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO, the Debtor paid over \$4.00 for each day which the employee worked, to the Annuity Fund and said sums were credited to the individual account of each employee, except that the Debtor failed to pay over the sum of \$5,114.00, as aforesaid.

Under the terms of the Annuity Plan:

“7(e)(1) In the event that a Participant should become permanently disabled, cease to be a Participant, or enter the Armed Forces of the United States, then such Participant shall cease to be covered by this Annuity Plan and he shall be entitled to receive the sum of Fifty (\$50.00) Dollars per month until the monies credited to such Participant's account have been exhausted and such Participant shall receive no other benefits.

“(e)(2) In the event that such former Participant should die before he has exhausted his account, then and in that event the balance accumulated in such former Participant's account shall be paid to such deceased's beneficiary in monthly installments of One Hundred (\$100.00) Dollars each, or in a lump sum, as the Trustees may decide. Commencing July 1, 1964, the aforesaid monthly installments shall be increased to \$125.00. per month.”

In addition each employee may borrow from his individual account while continuing to work, when he needs a loan.

The aforesaid \$5,114.00. belongs to the following employees:

<i>Social Security #</i>	<i>Name</i>	<i>Annuity</i>
115-18-1511	W. Bantel	\$ 184.00.
104-28-3513	T. J. Cleary	190.00.
237-18-9048	A. M. Condrey	180.00.
129-14-0808	W. J. Conkling	188.00.
090-12-4690	M. J. Conlon	180.00.
071-32-7765	J. J. Constantino	184.00.
085-32-1620	V. Cupola	160.00.
123-34-5496	F. Dellaquila	176.00.
074-20-9463	F. A. Dooner	188.00.
089-14-8408	J. J. Hannaford	128.00.
365-16-6616	G. A. Hester	Terminated
113-34-3428	E. A. Hoffman	204.00.
067-09-8572	W. Hoffman	80.00.
130-32-6461	P. Horacek	128.00.
415-20-7994	J. P. Jones	4.00.
076-34-1874	I. Katzman	180.00.
129-28-4306	D. R. Kimmel	204.00.
244-10-6897	L. M. Lawing	44.00.
156-18-1875	L. Lunau	112.00.
107-07-7008	E. McCarthy	132.00.
084-08-9665	L. Micene	84.00.
086-16-6165	B. Miller	180.00.
099-23-4730	A. V. Newberry	48.00.
071-18-9186	C. Perlstein	128.00.
114-28-3247	J. Perretta	172.00.
085-36-4504	J. Ragozino	112.00.
073-34-8440	A. Reiss	192.00.
089-30-3542	E. Renzulli	180.00.

<i>Social</i> Security #	Name	Annuity
123-32-5000	M. Salzano	104.00.
119-32-5744	T. Scully	192.00.
101-07-6505	C. Sjoli	148.00.
110-28-0132	B. F. Stringfield	92.00.
085-34-3251	T. J. Watson	180.00.
123-20-1852	B. Wimpel	128.00.
126-30-2303	J. C. Ziegler	176.00.
051-18-1701	H. Hallums	100.00.
066-17-0791	C. Gibson	8.00.
374-30-7364	J. R. Roberts	24.00.
076-22-6606	W. Beaman	12.00.
254-18-2408	M. Sims	8.00.

TOTAL \$5,114.00.

Any doubt that this claim is entitled to wage priority is probably based upon *United States v. Embassy Restaurant, Inc., et al.*, 359 U. S. 29. This case is not in point. It concerns a Welfare Fund, not an Annuity Fund. In the *Embassy Restaurant* case the Court denied priority to the Welfare Fund for four reasons each inapplicable to the instant case:

1. "Let us examine the nature of these contributions. They are flat sums of \$8, per month for each workman. The amount is without relation to his hours, wages or productivity." (359 U. S. 32).

In the instant case the employer-contributions was not a flat sum, without relation to the time worked, but was \$4.00. for each day worked by each employee.

2. "It is due the trustees, not the workman, and the latter has no legal interest in it whatsoever." (359 U. S. 32).

In the instant case the individual employees, not the Trustees have the final vested interest in the sums placed in their individual accounts.

3. "These payments, owed as they are to the trustee rather than to the workman, offer no support to the workman in periods of financial distress." (359 U. S. 33).

In the instant case the workman relies on these sums in his account when in financial distress, whether unemployed or employed but nevertheless in need.

4. "Furthermore, if the claims of the trustees are to be treated on a par with wages, in a case where the employer's assets are insufficient to pay all in the second priority, the workman will have to share with the Welfare Plan, thus reducing his own recovery." (359 U. S. 33-34).

In the instant case a workman would not be prejudiced, but rather would be aided, by having the Annuity Fund share in the second priority.

With reference to the possible argument that Congress failed specifically to allow priority for contributions to individual Annuity Funds for workmen by amending the Bankruptcy Act it should be noted that such Annuity Fund, as distinguished from Pension and Welfare Funds, are a very new development, and Congress has had little opportunity to legislate with specific reference to workmen's Annuity Funds.

We respectfully refer the Referee to *Sulmeyer v. Pipe Trades Trust Fund*, 301 Fed. (2d) 768, CA 9, 1962. That Court affirmed a judgment holding that the claim of a Vacation and Holiday Benefit Fund was a priority wage claim and pointed out that the Vacation and Holiday benefits, unlike the Welfare benefit in *Embassy*, had been earned by the employees and are certain. Clearly, therefore, the Joint Industry Board, on behalf of the employees set forth above, is entitled to wage priority for its claim in the amount of \$5,114.00.

CONCLUSION

The stipulation allowing the claim of the Joint Industry Board as a priority wage claim should be upheld.

Respectfully submitted,

Dated: July 14, 1965.

HAROLD STERN,
Attorney for Claimants.

Of counsel:

HAROLD STERN,
NORMAN ROTHFELD.

Petition for Review

(R. pp. 43-45)

UNITED STATES DISTRICT COURT**EASTERN DISTRICT OF NEW YORK**

[SAME TITLE]

To the Honorable Judges of this Court:

The petition of the Joint Industry Board of the Electrical Industry, an unincorporated association, respectfully represents:

1. Your petitioner is aggrieved by the Order herein of Sherman D. Warner, Referee in Bankruptcy, dated April 25, 1966, a copy of which Order is annexed hereto, marked Exhibit "A" and made a part hereof.

2. The Referee erred with respect to said Order in that he misinterpreted Section 64a(2) of the Bankruptcy Act, and he misinterpreted the decision of the Supreme Court of the United States in *United States v. Embassy Restaurant, Inc.*, 359 U. S. 29, 79 S. Ct. 554, and he misinterpreted the nature of the operation of the Annuity Fund of the Electrical Industry, all with the result that the Referee held that your petitioner's claim for the sum of \$5,114.00 was not entitled to wage priority, and he reduced said claim to a general claim.

WHEREFORE, your petitioner prays that said Order be reviewed by a Judge in accordance with the provisions of

the Bankruptcy Act, that said Order be reversed, and that your petitioner have such other and further relief as is just.

Dated: New York, April 29, 1966.

JOINT INDUSTRY BOARD OF THE
ELECTRICAL INDUSTRY,
Petitioner.

HAROLD STERN,
Attorney for Petitioner,
Office and Post Office Address,
No. 70 Pine Street,
New York, New York 10005,
WHitehall 4-9177.

(Verified.)

Certificate of Review

(R. pp. 46-47)

UNITED STATES DISTRICT COURT**EASTERN DISTRICT OF NEW YORK**

[SAME TITLE]

TO THE HONORABLE JUDGES OF THIS COURT:

I, SHERMAN D. WARNER, the Referee in charge of the above entitled proceeding, do hereby certify pursuant to Section 39a(8) as follows:

The order certified for review was made by me on April 25, 1966, in which and by which I allowed claim No. 4 filed by the Joint Industry Board of the Electrical Industry, Local No. 3, in the sum of \$10,537.34, as a general claim in the sum of \$10,027.34 and in the sum of \$510,000 as a priority claim, denying priority to an item in said claim of \$5,114.00.

This order is based upon my written decision dated April 25, 1966, and the facts are fully set forth therein.

The errors alleged are set forth in paragraph 2 of the petition for review dated April 29, 1966 filed by the attorney for petitioner.

Submitted herewith are the petition for review, the order to be reviewed, containing stipulation dated 6/14/65 of attorneys for trustee and attorneys for petitioner, my written decision, affidavit of mailing of notice of entry of order dated April 25, 1966, correspondence in memorandum form, memoranda of law, other correspondence, photo copy of original claim No. 4 of petitioner, waiver of deposit of peti-

tioner, and booklet of annuity plan of the Electrical Industry.

Dated at Jamaica, New York
May 23, 1966.

/s/ SHERMAN D. WARNER
Referee in Bankruptcy.

PLEASE TAKE NOTICE that this review shall be placed on the Bankruptcy Motion Calendar for argument on the 8th day of June 1966 at 10:00 A.M. at the United States Court House, Room No. 7, 225 Washington Street, Brooklyn, New York.

In connection with this review your attention is respectfully called to General Rule 9(c) of this Court:

Referee's Certificate and Notice mailed this day to:

SCHWARTZ & DUBERSTEIN, Esqs.
26 Court Street
Brooklyn, New York
Attorneys for Trustee.

HAROLD STERN, Esq.
70 Pine Street
New York, N. Y. 10005
Attorney for Joint Industry Board of the
Electrical Industry, Local #3.

JOSEPH P. HOEY, Esq.
United States Attorney
225 Washington Street
Brooklyn, New York.

Dated at Jamaica, New York
May 24, 1966.

/s/ SHERMAN D. WARNER,
Referee in Bankruptcy.

Priority Wage Claim

(R. pp. 48-52)

**UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK**

[SAME TITLE]

DENIS J. CRIMMINS of No. 420 Lexington Avenue, in the County of New York, State of New York, says:

I am the Executive Secretary of the Joint Industry Board of the Electrical Industry, an unincorporated association, with its principal office at 420 Lexington Avenue, Borough of Manhattan, City and State of New York, and am duly authorized to make this proof of claim on its behalf.

The Debtor, located at 61-51 Fresh Meadow Lane, Flushing, Long Island, New York, was at and before the filing of this petition and still is indebted to claimant in the amount of \$10,537.34.

The consideration of this debt is as follows:

The Debtor operated under a collective bargaining agreement with Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO. By the terms of this agreement the Debtor was required to contribute to, and the claimant was empowered and required to administer, various Trust Funds established for the welfare of the employees of the Debtor.

The Debtor has failed to make certain required payments for the above described funds during the three months prior to the filing of its petition.

The Annuity Plan of the Electrical Industry incorporated as part of the Debtor's collective bargaining agreement in Article II, Section 1(e) thereof, provides as follows:

"(a) Beginning with the first payroll week after January 1, 1954, and every week thereafter up to December 31, 1957, and for the duration of any renewal or extension of the collective bargaining agreement between the Employer and the Union, each electrical contractor shall pay into the Annuity Fund the sum of Four (\$4.00) Dollars per day for each day worked by each employee who is a Participant of this Annuity Plan.

"(b) The aforesaid Employer contributions under paragraph (a) hereof shall be credited to the individual account of each Participant but shall be payable to him only as hereinafter provided.

"(c) Such contributions shall be forwarded weekly to the Trustees within one (1) week after each payroll period."

The Debtor has failed to pay over to claimant this \$4.00 per day contribution in the amount of \$5,114.00. This sum constitutes a priority wage claim because these monies are held by claimant for the individual accounts of the employees of the Debtor.

The Debtor's collective bargaining agreement provides in Article II, as follows:

"Vacation Expense Plan:

"Section 1(f). The Joint Industry Board shall administer the Vacation Expense Plan. Except as hereinafter provided, in order to provide journeymen electricians covered by this agreement with expenses for a two week vacation each year to be granted at a time agreed upon by the employer and the journeymen electricians, all employers shall pay four (4%) percent of their weekly production payroll effective January 1, 1962. These payments shall be remitted weekly to the Vacation Expense Fund of the Joint Industry Board from which all journeymen who have worked for or have been unemployed and available to work for members of the Joint Industry Board in New York City for the twelve (12) months preceding May 1, 1962, May 1, 1963 and May 1, 1964 shall be paid expenses from the Vacation Expense Fund as determined by the Vacation Committee depending upon the financial condition of the Vacation Expense Fund. Commencing May 1, 1963 journeymen electricians who have worked for contributing employers for twenty-five (25) years or more shall be granted expenses for a three (3) week vacation each year."

The Debtor has failed to pay over its required contributions to the Vacation Expense Plan set forth above to the Joint Industry Board in the sum of \$1,624.53, all of which is entitled to priority because the computation of these monies is based upon the earnings of each of the employees and because each of the employees receives his vacation pay from these contributions.

The Debtor deducted \$510.00 from the weekly wages of its employees for the purpose of transmitting this sum to the claimant, as follows:

The Debtor's employees executed the following Partial Wage Assignments "I hereby authorize my present employer, or any future employer, to deduct \$10.00 from my wages each week until loan is paid in full and remit the same directly to the Loan Fund-Pension Committee, J.I.B. 420 Lexington Avenue, New York 17, N. Y., Room 208." Pursuant to these Partial Wage Assignments, the Debtor deducted \$510.00 from the employees' wages, which payments he failed to transmit to the claimant. Same is a priority claim because it is a portion of the employees' actual wages.

The Pension, Hospitalization and Benefit Plan, which is incorporated as part of the Debtor's collective bargaining agreement in Article II, Section 1(d) thereof, provides as follows in Section 3 of said Plan:

"3. The Pension, Hospitalization and Benefit Plan shall be financed as follows:

"(a) All Employers who employ A, DMS, G, J and M members of Local Union No. 3 (or those working as such) shall pay five (5%) per cent of their weekly production payroll.

"(b) * * *. All payments shall be made the pay-day after the payroll week ending."

The Debtor has failed to pay over its required contributions to the Pension, Hospitalization and Benefit Plan in the amount of \$2,030.66.

The Debtor's collective bargaining agreement also provides in Article II, Section 1(d), (e), (f) and (g) thereof

that the Joint Industry Board shall administer the various funds and the cost of said administration shall be borne by each employer. Said expense which is equal to three-fourths ($\frac{3}{4}$ ths) of one (1%) percent of the weekly payroll was not paid by the Debtor during the three months prior to the filing of its petition, which delinquency is in the amount of \$304.60.

The Debtor's collective bargaining agreement provides in Addenda No. 2 thereof, as follows:

"It is agreed that in accord with the National Employees Benefit Agreement entered into between the National Electrical Contractors Association and the International Brotherhood of Electrical Workers on September 3, 1946, as amended, the Employer will forward weekly an amount equal to 1% of his gross labor payroll paid to workmen employed under the terms of this agreement, to the designated Local Employees Benefit Board.

"The Employer will also forward weekly a payroll report on a form prescribed for that purpose by the National Board."

The Debtor has failed to pay over the one (1%) percent of payroll contribution to the above Trust Fund in the amount of \$572.72.

NEW YORK STATE DISABILITY—The collective bargaining agreement, with reference to Disability Insurance, provides:

"ARTICLE V. 3. Every Individual Employer agrees to provide for electrical workers in his employ increased benefits under the New York State Disability

Benefits Law of \$45.00 per week for twenty-six (26) weeks.

"In an effort to increase payments to electrical workers and to lengthen the period for such payments every individual Employer agrees to participate in a Group New York State Disability Benefit Plan to be operated through or by the Joint Industry Board of the Electrical Industry."

The Debtor was delinquent in its payments to the Group New York State Disability Benefit Plan in the amount of \$380.83.

No part of the above total of \$10,537.34 has been paid, and there are no set-offs or counterclaims thereto, nor is any security being held therefor.

JOINT INDUSTRY BOARD OF THE
ELECTRICAL INDUSTRY,

/s/ Denis J. Crimmins
DENIS J. CRIMMINS,
Executive Secretary.

To: HAROLD STERN, Esq., 70 Pine Street, New York 5, New York, or representative.

Trustee's Notice of Appeal**UNITED STATES COURT OF APPEALS****SECOND CIRCUIT.**

[SAME TITLE]

Sir:

PLEASE TAKE NOTICE that Warren C. Schwartz, trustee in bankruptcy of A & S Electric Corp., bankrupt, joins in the appeal to the United States Court of Appeals for the Second Circuit from the order of the Honorable George Rosling entered in this action on November 4, 1966 confirming the order of Honorable Sherman D. Warner, Referee in Bankruptcy and further joins in the memorandum of law of the appellant Joint Industry Board for the Electrical Industry thereon.

Dated: Brooklyn, New York
January 13, 1967.


Yours, etc.,

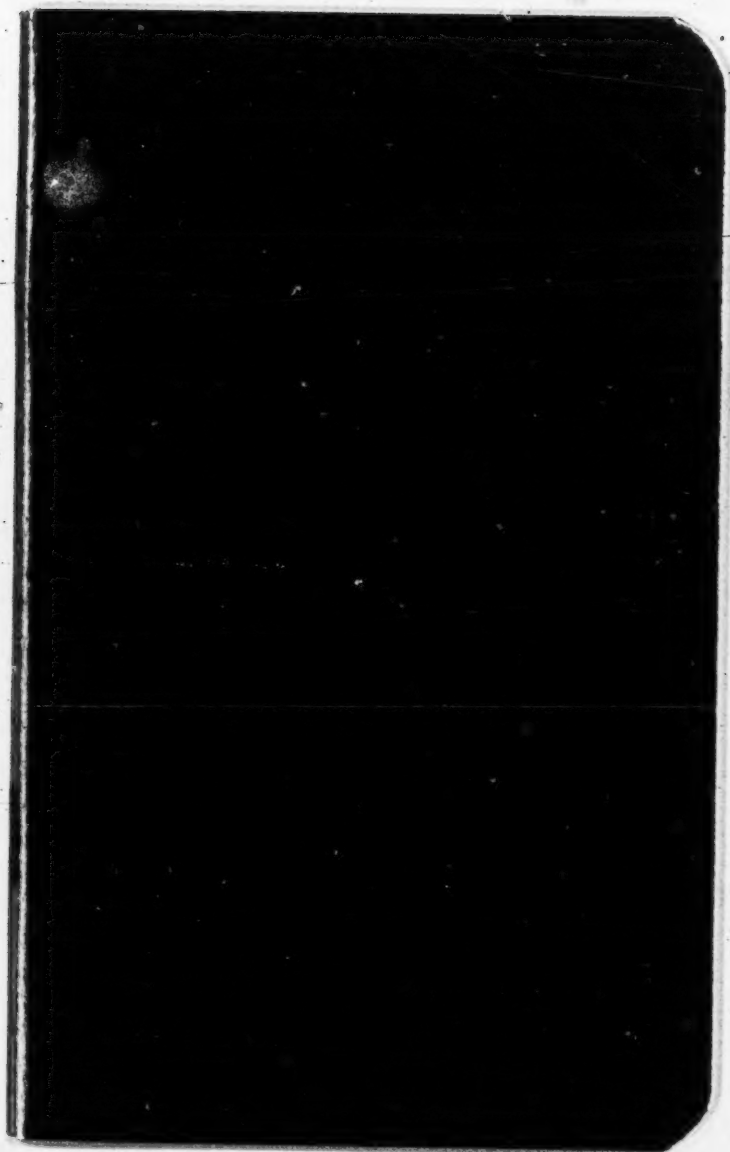
SCHWARTZ & DUBERSTEIN and
LOUIS FELSTINER,
Attorneys for Trustee,
26 Court Street,
Brooklyn, New York.

To:

U. S. ATTORNEY,
225 Washington Street,
Brooklyn, New York.

Booklet of Annuity Plan of the Electrical Industry
(R. pp. 53-67)

(See opposite) 




Booklet of Annuity Plan of the Electrical Industry

(R. pp. 53-67)

ANNUITY COMMITTEE OF THE JOINT INDUSTRY BOARD OF THE ELECTRICAL INDUSTRY

158-11 Jewel Avenue, Flushing, L. I.

AXtel 1-2000

(See opposite) 

HAROLD HARPER
Public Member

TRUSTEES

☐ HAROLD A. WEBSTER
Chairman

☐ EFREM A. KAHN
Treasurer

★ HARRY VAN ARSDALE JR.
Secretary

★ JEREMIAH P. SULLIVAN

☐ SIDNEY P. LIPKINS ★ ALBERT J. MACKIE
☐ J. M. WATTERS JR. ★ EDWARD J. CLEARY

MICHAEL J. CRIMMINS
Executive Secretary

☐ Employer Trustees
★ Union Trustees

ANNUITY PLAN OF THE ELECTRICAL INDUSTRY AGREEMENT entered into and adopted at New York City the 11th day of December 1957, by and between the NEW YORK ELECTRICAL CONTRACTORS' ASSOCIATION, INC., the MASTER ELECTRICAL CONTRACTORS' ASSOCIATION, INC., the GREATER CITY ELECTRICAL CONTRACTORS' ASSOCIATION, INC. and the ASSOCIATION OF ELECTRICAL CONTRACTORS, INC., each an employers trade association, having its principal place of business located in the City of New York, representing the employers in the electrical contracting industry, hereinafter jointly referred to as the "Employer" or the "Employer Association" and LOCAL UNION NO. 3 of the INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, hereinafter referred to as the "Union," and last amended effective July 1, 1964.


WITNESSETH:

WHEREAS, the Employer and the Union entered into a collective bargaining agreement which under its terms remains in effect until June 30, 1966 and from year to year thereafter, under which it was agreed, among other things, that an Annuity Plan of the electrical industry should be administered for the electrical contracting industry in the City of New York, for the purpose of providing retirement and death benefits to the workers included within the bargaining unit represented by the Union under the collective bargaining agreement between the Employer and the Union in order to aid such workers, their families, and better their every-day living conditions;

NOW, THEREFORE, this Agreement is intended to set forth the terms and conditions of the Annuity Plan:

Booklet of Annuity Plan of the Electrical Industry

(R. pp. 53-67)

(See opposite) 

In consideration of the premises and of their mutual covenants, the parties agree as follows:

1. *Title:* This Plan shall be known as the "Annuity Plan of the Electrical Industry."

2. *Administration:* The Plan shall be administered by Trustees, as herein provided:

(a) The Trustees shall consist of four (4) Employer representatives designated by the Employer and four (4) Union representatives designated by the Union. All vacancies shall be filled by the side on which the vacancy occurs. The Trustees shall elect a Chairman, Treasurer and Secretary from among their members. They, and each one of the Trustees, shall constitute a Board of Trustees. A quorum at meetings shall consist of at least two (2) Trustees representing the Employer and two (2) Trustees representing the Union. All moneys shall be deposited in a bank or trust company in the name of the "Annuity Fund of the Electrical Industry," and shall be known as the "Annuity Fund of the Electrical Industry," and all withdrawals from such Fund shall be signed and countersigned by two (2) Trustees, one (1) of whom shall be an Employer-Trustee and the other shall be a Union-Trustee, and accounted for to the Annuity Plan of the Electrical Industry in semi-annual statements.

A person designated by the United States District Court for the Eastern District of New York or by any other court or public body to represent the public and to be known as the "Public Member" shall meet and confer with the Trustees.

(b) The Trustees shall keep full and complete records of the administration of the Fund, which shall be open to inspection at all reasonable hours by any contributing Employer or by the duly authorized officials of the Union or by the duly authorized representatives of any such Employer

or authorized Union official. Annual audits shall be made by Certified Public Accountants licensed by the State of New York, employed by the Trustees, and a statement of the results of such audit shall be available for inspection by the Employer, the Union and the individual Participants at the principal office of the Trustees. A copy of such statement shall be furnished by the accountants to each member of the Board of Trustees.


(c) The Trustees may also appoint an Executive Secretary who shall attend all meetings of the Trustees, keep minutes of the proceedings and carry on the correspondence. He shall conduct all business assigned to him by the Trustees or by the Chairman.

(d) The Trustees may employ counsel and agents and such clerical, accounting and actuarial services as they may require in carrying out the provisions of the Annuity Plan of the Electrical Industry. They may purchase such supplies and equipment as in their discretion they may find necessary and appropriate in the performance of their duties. The salaries of employees, the fees of counsel and other experts and the cost of supplies, equipment and payment of all other expenses, which the Trustees find to be reasonable and necessary in connection with the administration of the Fund or which have been incurred in connection with the establishment thereof, shall be paid upon their order from the Fund.

(e) The Trustees shall be empowered to invest and re-invest all funds of the Annuity Plan in such housing, mortgages, Government and other securities as they may select in their sole discretion and to purchase, lease for any term of years, sell, exchange, convey or dispose of any property, whether real or personal, or any interest therein, all of which shall be at such prices and upon such terms and conditions as said Trustees may deem

Booklet of Annuity Plan of the Electrical Industry

(R. pp. 53-67)

(See opposite) 

advisable to carry out the purposes of the fund and whether or not any of the foregoing are authorized by law for the investment of trust funds generally; to borrow money in such amounts and upon such terms and conditions as shall be deemed advisable by the Trustees to carry out the purposes of the fund and to pledge any securities and to mortgage any property, real or personal, or any interest therein, for the payment of any such loans; to lend monies upon such terms and conditions as they deem advisable; and to do all acts, whether or not expressly authorized herein, which the Trustees may deem necessary or proper to effectuate the foregoing and for the protection of the property held hereunder.

(f) Each of the Trustees shall be protected in acting upon any paper or document believed by him to be genuine and to have been made, executed and delivered by the proper party purporting to have made, executed or delivered the same, and shall be protected in relying and acting upon the opinion of legal counsel in connection with any matter pertaining to the administration or execution of this Fund. No Trustee shall be liable for any action taken or omitted by him in good faith and in the exercise of reasonable care, nor for the acts of any agent, employee or attorney selected by the Trustees with reasonable care, nor for any act or omission of any other Trustee.

(g) The Trustees shall not be liable for the making, retention, or sale of any investment or reinvestment made by them as herein provided, nor for any loss to or diminution of the Trust Fund, except due to their wilful misconduct or fraud. The Trustees shall not be liable for any action taken or omitted by them in the exercise of reasonable care or in reliance upon the opinion of legal counsel.

(h) Neither the Trustees or any individual or successor Trustee shall be personally answerable or liable for any liabilities or debts of the Fund contracted by them as such Trustees, or for the non-fulfillment of contracts, but the same shall be paid out of the Annuity Fund of the Electrical Industry, chargeable therefor, and the Annuity Fund of the Electrical Industry is hereby charged with a first lien in favor of such Trustees for his or their security and indemnification for any amounts paid out by any Trustee for any such liability and for his and their security and indemnification against any liability of any kind which the Trustees or any of them may incur hereunder; provided, however, that nothing herein shall exempt any Trustee from liability arising out of his own wilful misconduct, bad faith or gross negligence, or entitle such Trustee to indemnification for any amounts paid or incurred as a result thereof.

(i) The Trustees shall have the sole power to construe and apply this Agreement and their construction and application of the same reasonably arrived at in good faith shall be final and conclusive.

(j) In the event of a deadlock resulting from the failure of the Employer and Union Trustees to agree on a matter relating to the administration of the Fund, then and in that event, the Trustees shall appoint an impartial Umpire to decide such dispute and upon the failure of the Trustees to agree within a reasonable length of time upon the selection of an impartial Umpire, either the Employer or Union Trustees may petition the United States District Court for the Eastern District of New York for the appointment of such impartial Umpire.


Booklet of Annuity Plan of the Electrical Industry

(R. pp. 53-67)

3. Trustees:

- (a) The four (4) Employer Trustees shall be:
 HAROLD A. WEBSTER
 EFREM A. KAHN
 SIDNEY P. LIPKINS
 J. M. WATTERS, JR.
- (b) The four (4) Union Trustees shall be:
 HARRY VAN ARSDALE JR.
 JEREMIAH P. SULLIVAN
 ALBERT J. MACKIE
 EDWARD J. CLEARY

The Public Member shall be HAROLD HARPER.

(See opposite) 

(c) The Trustees named in the foregoing subdivisions (a) and (b) hereby accept the trust created and established herein, and consent to act as Trustees therefor, and declare that they will administer the said Trust. The signature of a Trustee to any counterpart or copy of this Agreement and Declaration of Trust shall be conclusive evidence of his acceptance as aforesaid.

(d) Each Trustee above named and each successor Trustee shall continue to serve as such until his death, incapacity or resignation.

(e) A Trustee may resign and become fully discharged from all further duty or responsibility hereunder upon giving ten (10) days' notice in writing to the remaining Trustees or such shorter notice as the remaining Trustees may accept as sufficient, in which notice there shall be stated a date when such resignation shall take effect; and such resignation shall take effect on the date specified in the notice unless a successor Trustee shall have been appointed at an earlier date, in which event such resignation shall take effect immediately upon the appointment of such successor Trustee.

(f) Any successor Employer Trustee or any successor Union Trustee shall immediately upon his

designation as a successor Trustee and his acceptance of the trusteeship in writing, filed with the Trustees, become vested with all the property rights, powers and duties of a Trustee hereunder with like effect as if originally named as a Trustee and all the Trustees then in office and all other parties shall immediately be notified.

4. *Contributing Employers:* All Employers, whose Employees are represented by Local Union #3 performing the work of Journeymen Electricians; Fifth, Fourth, Third, Second and First Year Apprentices; Motor Repair; Armature Winding; Routemen and Trouble Shooters; Superintendents; Electrical Street Lighting Employees; Marine Electrical Employees; Electrical Elevator Men; Electrical Expeditors and Electrical Stock Clerks or other employees represented by Local Union #3 performing other classifications of work who may be admitted to this Plan, shall be deemed contributing employers.

In addition, Local Union #3 insofar as its officers, business representatives and the editor of the Union newspaper are concerned, and the Joint Industry Board of the Electrical Industry insofar as its employees are concerned who shall be covered by this Annuity Plan shall be deemed to be Contributing Employers provided that Local Union #3 and the Joint Industry Board of the Electrical Industry as Contributing Employers make the required contributions as Employers on behalf of their Employees who are covered under the Annuity Plan and satisfy the requirements for Participants as established by the Employer and Union Representatives (collectively referred to as "The Trustees") and agree to be bound by the terms and conditions of this Annuity Plan.

5. *Employer Contributions:* All contributions shall be determined as follows:

Booklet of Annuity Plan of the Electrical Industry

(R. pp. 53-67)

(See opposite).

(a) For the duration of the present collective bargaining agreement between the employer and the Union and any renewal or extension thereof covering Journeymen Electricians; Fifth, Fourth, Third, Second and First Year Apprentices; Motor Repair; Armature Winding; Routemen and Trouble Shooters; Superintendents; Electrical Street Lighting Employees and Marine Electrical Employees, each electrical contractor shall pay into the Annuity Fund the sum of Four Dollars (\$4.00) per day for each day worked or each holiday for which payment is received by each employee who is a participant of this Annuity Plan.

Local Union #3 and the Joint Industry Board of the Electrical Industry shall likewise pay into the Annuity Fund the sum of Four Dollars (\$4.00) per day for each day worked or each holiday on behalf of the officers, business representatives, editor of the Union newspaper and the employees of the Joint Industry Board who are participants of this Annuity Plan.

Every other employer admitted as an employer to this Annuity Plan shall pay into the Annuity Fund the sum of Four Dollars (\$4.00) per day for each day worked or each holiday for which payment is received by his employees who are participants of this Annuity Plan or a fraction thereof. However, where the contributing employer contributes less than Four Dollars (\$4.00) per day, the participant on whose behalf such contribution is made shall receive only a proportionate share of the benefits herein provided.

(b) The aforesaid Employer contributions under paragraph (a) hereof shall be credited to the individual account of each Participant but shall be payable to him only as hereinafter provided.

(c) Such contributions shall be forwarded weekly to the Trustees within one (1) week after each payroll period.

6. *Participants:* All employees represented by the Union for whom employers shall make contributions to this Annuity Plan shall be eligible to participate in this Annuity Plan and shall be participants.

In addition, the officers of Local Union #3, business representatives of Local Union #3, editor of Local Union #3 newspaper, the employees of the Joint Industry Board of the Electrical Industry, for whom Local Union #3 and the Joint Industry Board shall make contributions, shall be eligible to participate in this Annuity Plan and shall be participants.

Participants on whose behalf employers make contributions in amounts less than Four Dollars (\$4.00) per day shall receive benefits proportionate to other participants.


7. *Benefits:* Each Participant of this Annuity Plan shall be entitled to receive the following benefits:

(a)(1) In the event that any Participant covered by this Annuity Plan should die between January 1, 1954 and December 31, 1954, both dates inclusive, then and in that event the designated beneficiary of such deceased Participant shall be paid the sum of One Thousand (\$1,000.00) Dollars as a death benefit, out of income, if available, in monthly installments of One Hundred (\$100.00) Dollars each.

(a)(2) In the event that any Participant who was covered by this Annuity Plan prior to January 1, 1956 should die on or after January 1, 1955, and on or before December 31, 1957, both dates inclusive, then and in that event the designated beneficiary of such deceased Participant shall be paid the sum of Two Thousand (\$2,000.00) Dollars as a death benefit, out of income, if available, in monthly installments of One Hundred (\$100.00) Dollars each.

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(See opposite) 

(a)(3) In the event that a Participant of this Annuity Plan did not become a Participant until after January 1, 1956, and died on or before December 31, 1958 after he had one (1) year's continuous participation in the Annuity Plan, then and in that event the designated beneficiary of such Participant shall be paid the sum of One Thousand (\$1,000.00) Dollars as a death benefit, out of income, if available, and should such Participant die after two (2) years continuous participation in the Annuity Plan, the designated beneficiary of such Participant shall be paid the sum of Two Thousand (\$2,000.00) Dollars as a death benefit, in monthly installments of One Hundred (\$100.00) Dollars each.

(a)(4) In the event that a Participant of this Annuity Plan should die on or after January 1, 1959, after he had one (1) year's continuous participation in the Annuity Plan, then and in that event the designated beneficiary of such Participant shall be paid the sum of One Thousand (\$1,000.00) Dollars as a death benefit, out of income, if available, and should such Participant die after two (2) years continuous participation in the Annuity Plan, the designated beneficiary of such Participant shall be paid the sum of Three Thousand (\$3,000.00) Dollars as a death benefit, out of income, if available, in monthly installments of One Hundred (\$100.00) Dollars each. This provision shall be retroactive to January 1, 1959.

(a)(5) In the event a Participant of this Annuity Plan should die on or after January 1, 1962, after he had one (1) year's continuous participation in the Annuity Plan, then and in that event the designated beneficiary of such Participant shall be paid the sum of One Thousand (\$1,000.00) Dollars as a death benefit out of income, if available, and should such Participant die after two (2) years continuous participation in this

Annuity Plan, then and in that event the designated beneficiary of such Participant shall be paid the sum of Four Thousand (\$4,000.00) Dollars as a death benefit out of income, if available, in monthly installments of One Hundred (\$100.00) Dollars each.

(a)(6) In the event a participant of this Annuity Plan should die on and after January 1, 1964, after he had one (1) year's continuous participation in the Annuity Plan, then and in that event the designated beneficiary of such Participant shall be paid the sum of One Thousand (\$1,000.00) Dollars as a death benefit out of income, if available, and should such Participant die after two (2) years continuous participation in this Annuity Plan, then and in that event the designated beneficiary of such participant shall be paid the sum of Five Thousand (\$5,000.00) Dollars as a death benefit out of income, if available, in monthly installments of One Hundred (\$100.00) Dollars each. This provision shall be retroactive to January 1, 1964.


(b) In the event that a Participant should die, the designated beneficiary of such Participant, in addition to the death benefits set forth above in subdivision (a), shall receive all monies to the credit of the account of such Participant, in monthly installments of One Hundred (\$100.00) Dollars each.

(c) Commencing July 1, 1964, all payments to designated beneficiaries whether payment of death benefits or equity shall be increased from One Hundred (\$100.00) Dollars per month to One Hundred and Twenty-five (\$125.00) Dollars per month.

(d)(1) In the event that any Participant should retire from the industry at the age of sixty (60), or over, on or after April 1, 1959 and before July 1, 1961 or become permanently disabled after such Participant has been employed by a contribut-

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(See opposite) 

ing Employer or available for employment at least ten (10) years prior to his permanent disability, such Participant shall be entitled to receive the sum of Seventy-five (\$75.00) Dollars per month until the monies credited to such Participant's account have been exhausted.

(d)(2) In the event that any Participant should retire from the industry at the age of sixty (60), or over, on or after July 1, 1961 and before July 1, 1963 or become permanently disabled after such Participant has been employed by a contributing Employer or available for employment at least ten (10) years prior to his permanent disability, such Participant shall be entitled to receive the sum of One Hundred (\$100.00) Dollars per month until the monies credited to such Participant's account have been exhausted.

(d)(3) In the event that any Participant should retire from the industry at the age of sixty (60), or over, on or after July 1, 1963 and before January 1, 1965 or become permanently disabled after such Participant has been employed by a contributing Employer or available for employment at least ten (10) years prior to his permanent disability, such Participant shall be entitled to receive the sum of One Hundred and Twenty-five (\$125.00) Dollars per month until the monies credited to such Participant's account have been exhausted.

(d)(4) In the event that any Participant should retire from the industry at the age of sixty (60), or over, on or after January 1, 1965, or in the event that any Participant should retire at the age of fifty-eight (58) years or over on or after July 1, 1965, or become permanently disabled, after such Participant has been employed by a contributing Employer or available for employment at least ten (10) years prior to his permanent disability, such Participant shall be entitled to receive the sum of One Hundred Fifty (\$150.00) Dollars per

month until the monies credited to such Participant's account have been exhausted.

(e)(1) In the event that a retired Participant or a permanently disabled Participant who has been employed by a contributing Employer or available for employment at least ten (10) years should die on or after January 1, 1962 and before January 1, 1964 then and in that event the balance accumulated in such Participant's account shall be paid to such Participant's designated beneficiary in monthly installments of One Hundred (\$100.00) Dollars each.


(e)(2) In the event a retired Participant or a permanently disabled Participant who has been employed by a contributing Employer or available for employment at least ten (10) years should die on or after January 1, 1964 then and in that event the balance accumulated in such Participant's account shall be paid to such Participant's designated beneficiary in monthly installments of One Hundred (\$100.00) Dollars each up to July 1, 1964 and in monthly installments of One Hundred and Twenty-five (\$125.00) Dollars thereafter.

In addition, upon the death of any retired Participant or a Participant who has been permanently disabled after such Participant has been employed by a contributing Employer or available for employment at least ten (10) years prior to his permanent disability, the Annuity Plan shall pay the designated beneficiary of such Participant, out of income, if available, the following death benefits:

One (1) year's continuous participation.....	\$500.00
More than one (1) year's continuous participation and up to and including two (2) years participation	\$750.00
More than two (2) years continuous participation and up to and including three (3) years participation	\$1,000.00

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More than three (3) years continuous participation and up to and including four (4) years participation	\$1,250.00
More than four (4) years continuous participation and up to and including five (5) years participation	\$1,500.00
More than five (5) years continuous participation and up to and including six (6) years participation	\$1,750.00
More than six (6) years continuous participation and up to and including seven (7) years participation	\$2,000.00
More than seven (7) years continuous participation and up to and including eight (8) years participation	\$2,250.00
More than eight (8) years continuous participation and up to and including nine (9) years participation	\$2,500.00
More than nine (9) years continuous participation and up to and including ten (10) years participation	\$2,750.00
More than ten (10) years continuous participation and up to and including eleven (11) years participation	\$3,000.00
More than eleven (11) years continuous participation and up to and including twelve (12) years participation	\$3,250.00
More than twelve (12) years continuous participation and up to and including thirteen (13) years participation	\$3,500.00
More than thirteen (13) years continuous participation	\$3,750.00
in monthly installments of \$100.00 each up to July 1, 1964, and in monthly installments of \$125.00 each thereafter.	

(e)(3) In the event that a retired Participant should return to the employ of a contributing Employer, such Participant shall be deemed to be

a new Participant as of the date of his return to employment, and should such Participant die before he became entitled to the maximum death benefit as provided in paragraph 7(a) of this Annuity Plan, his designated beneficiary shall receive a sum not to exceed the amount of death benefit as provided in paragraph 7(a) of this Annuity Plan, nor less than the amount set forth in paragraph 7(e)(1) and 7(e)2 of this Annuity Plan.


(f)(1) In the event that a Participant should become permanently disabled (who has not been employed by a contributing Employer or available for employment for ten (10) years or more) cease to be a Participant or enter the Armed Forces of the United States before January 1, 1965, then such Participant shall cease to be covered by this Annuity Plan and he shall be entitled to receive the sum of Fifty (\$50.00) Dollars per month until the monies credited to such Participant's account have been exhausted and such Participant shall receive no other benefits.

(f)(2) In the event that a Participant should become permanently disabled (who has not been employed by contributing Employer or available for employment for ten (10) years or more) cease to be a Participant or enter the Armed Forces of the United States on and after January 1, 1965, then such Participant shall cease to be covered by this Annuity Plan and he shall be entitled to receive the sum of Sixty (\$60.00) Dollars per month until the monies credited to such Participant's account have been exhausted and such Participant shall receive no other benefits.

(f)(3) In the event that such former Participant should die before July 1, 1964, before he has exhausted his account, then and in that event, the balance accumulated in such former Participant's account shall be paid to such deceased's beneficiary

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in monthly installments of One Hundred (\$100.00) Dollars each.

Commencing July 1, 1964 the aforesaid monthly installments shall be increased to One Hundred Twenty-five (\$125.00) Dollars per month.

(g) The Trustees annually will review the amount of income available for the payment of death benefits and if, in their opinion, such monies are in excess of those necessary to pay the death benefits provided hereunder, the Trustees Beginning May 1, 1965 shall declare an annual dividend in such amount as they may determine, which monies shall be credited annually proportionately to the principal of each Participant's account.

8. Termination:

(a) The Annuity Plan of the Electrical Industry shall be terminated when there is no longer in force an agreement between the Employer and the Union requiring Employer contributions to the said Annuity Fund for the purposes herein provided. The Annuity Fund may, likewise, be terminated at any time by the unanimous vote of all Trustees with the consent of the Employer and the Union.

(b) In the event of the termination of the Annuity Fund, the Trustees shall apply the Fund to pay or provide for the payment of any and all obligations of the said Trust and distribute and apply any remaining surplus in such manner as will in their opinion, best effectuate the purpose of the said Trust; provided, however, that no part of the corpus or income of said Trust shall be used for or diverted to purposes other than the exclusive benefit of the Participants, or the administrative expenses of the Annuity Fund, or for other payments in accordance with the provisions of the Annuity Plan.

(c) Upon termination of the Annuity Fund the

Trustees shall forthwith notify the Employer, the Union and all other necessary parties and shall continue as Trustees for the purpose of winding up the affairs of the Trust.

9. General Provisions:

(a) The Trustees shall make such rules and regulations as may be necessary for the proper administration and operation of this Annuity Plan.


(b) All forms required for the administration of this Plan, including the weekly reports to be made by the Employers with accompanying contributions, as well as forms on which Participants shall designate beneficiaries, shall be prepared by the Trustees and supplied to the Employers and Participating employees.

(c) No person claiming by or through any Participant by reason of having been named as beneficiary in a certificate, or otherwise, nor any contributing Employer, nor the Union, or any other person, partnership, corporation or association shall have any right, title or interest in or to the Annuity Fund or any part thereof. Under no circumstances shall any amount contributed by the Employers revert to them, or any of them.

(d) The Trustees shall have the power to demand, collect and receive Employer payments and shall hold such monies as part of the Annuity Fund for the purposes specified in this Agreement. All suits and proceedings to recover Employer payments, or to enforce or protect any other right, demand or claim in behalf of the Trustees or of the Annuity Fund, may be instituted and prosecuted on behalf of the Annuity Fund and the Trustees by the Chairman in his capacity, as such; or by any two (2) Trustees, one (1) of whom shall be an Employer Trustee and the other of whom shall be a Union Trustee thereunto authorized by the Trustees.

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(See opposite) 

(e) The decision of a majority of the Trustees shall be final in all matters requiring administrative action.

(f) The benefits payable to Participants or beneficiaries under this Plan cannot be assigned and shall not be liable to attachment, garnishment or other process, and shall not be taken, appropriated or applied by any legal or equitable process, or by operation of law, to pay any debt or liability of the Participant or of any beneficiary or next-of-kin who may have a right thereunder, either before or after payment.

(g) Upon the failure of a Participant to name and/or designate a beneficiary or beneficiaries the benefits shall be payable in the following order of priority:

- (A) to surviving spouse;
- (B) children of the deceased Participant;
- (C) father of the deceased Participant;
- (D) mother of the deceased Participant;
- (E) brothers and sisters of the deceased Participant;
- (F) personal representative of the deceased Participant's estate.

Where, under this section, benefits become payable to a person who is under twenty-one (21) years of age, the amount may be paid to such persons—without requiring the appointment of a guardian—by paying such amount to anyone over the age of twenty-one (21) years who submits satisfactory proof that he or she is supporting and maintaining such person and gives assurance to the Plan in satisfactory form that the monies paid over will be used for such purposes.

(h) This Agreement may be amended at any time or from time to time by the Trustees, with the consent of the Employer and the Union, except that no amendment shall divert the Fund as then constituted or any part thereof for any purposes other than stated in this Agreement.

IN WITNESS WHEREOF, the parties hereto have hereunto affixed their hands and seals the 1st day of August, 1964.

NEW YORK ELECTRICAL CONTRACTORS' ASSOCIATION, INC.

Sidney P. Lipkins, *President*

MASTER ELECTRICAL CONTRACTORS' ASSOCIATION, INC.

Felix Hirsch, *President*

GREATER CITY ELECTRICAL CONTRACTORS' ASSOCIATION, INC.

Joseph Coletta, *President*

ASSOCIATION OF ELECTRICAL CONTRACTORS' INC.

A. David Yadlovker, *President*

LOCAL UNION NO. 3, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

Edward J. Cleary, *President*

Employer Trustees

Harold A. Webster
Efrem A. Kahn
Sidney P. Lipkins
J. M. Watters Jr.

Union Trustees

Harry Van Arsdale Jr.
Jeremiah P. Sullivan
Albert J. Mackie
Edward J. Cleary